Filed 12/6/16 P. v. Rashid CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DAVION RASHID, Defendant and Appellant.	B264607 (Los Angeles County Super. Ct. No. MA061628)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles A. Chung, Judge. Affirmed as modified.

Pamela J. Voich, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael R. Johnsen and Steven E. Mercer, Deputy Attorneys General, for Plaintiff and Respondent.

Davion Rashid appeals from the judgment entered following a jury trial which resulted in his conviction of four counts of burglary (Pen. Code, § 459)[1] and one count of grand theft of a firearm (§ 487, subd. (d)(2)). Defendant admitted that he had suffered a prior conviction within the meaning the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12). The trial court sentenced defendant to a total term of 16 years in state prison.

Defendant makes five claims of error on appeal, and also asks this court to review the transcripts of the sealed *Pitchess*[2] proceedings. Three of defendant's claims relate to key prosecution witness Los Angeles County Sheriff's Department Deputy Jeremiah McNutt. Defendant claims the evidence is not sufficient to support the verdict because Deputy McNutt's testimony is vague and unbelievable. Defendant also contends the trial court abused its discretion in excluding impeachment evidence related to a civil lawsuit filed against Deputy McNutt as the result of a traffic stop. Defendant further asserts the trial court erred in denying his request for a jury instruction or mistrial after Deputy McNutt testified on cross-examination about two surveillance videos which had not been disclosed to the defense.

The jury found Deputy McNutt credible. McNutt's testimony, together with other evidence, constitutes substantial evidence to support defendant's convictions. The results of the civil lawsuit against McNutt and other deputies were mixed, and so the trial court did not abuse its discretion in excluding the evidence pursuant to Evidence Code section 352. The record does not support defendant's claim that the prosecution was aware of the two videos before trial or his claim that the videos were favorable to the defense.

---

1 Further undesignated statutory references are to the Penal Code.

2 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

The trial court's proposed remedies were adequate to cure any harm from Deputy's McNutt's references to those two videos.

In addition to the claims of error involving Deputy McNutt, defendant contends the trial court erred in ordering the use of physical restraints because defendant never tried to escape and never engaged in violent or physically threatening behavior in court. He also contends the court miscalculated the amount of his presentence custody.

There is sufficient evidence of nonconforming behavior by defendant to support the trial court's decision to restrain defendant. Respondent agrees defendant's presentence credits should be corrected. We order defendant's presentence custody credits corrected, as set forth in our disposition. We affirm the judgment in all other respects.

FACTS

In late 2013, four burglaries took place around Gadsden Avenue and Avenue K in Lancaster.

On November 7, 2013, Billie Reedy returned to her residence at 43400 Gadsden Avenue in Lancaster and found that her garage door was partially open. Two motorcycles were missing. Reedy noticed that a screen had been removed from a window, and the window was open. She discovered that numerous items had been taken from her home, including an iPad, iPods, a Wii game console, Xbox video games, movies and bags. The motorcycles were eventually found but were heavily damaged. None of Reedy's electronics were recovered.

On November 27, 2013, Puneet Saroa returned home to the residence he shared with Kimberly Ward at 43857 West Adler in Lancaster and discovered the side door was open and the home had been ransacked. Saroa believed the burglars entered through a window adjacent to the side door and

left through a door. Numerous items were missing from the residence, including Ward's Providence Holy Cross bag, an Xbox game console, coins, jewelry, televisions and cell phones. Some of the items were found by police and returned. Some of Ward's jewelry was found in a pawnshop and she was able to buy it back.

On December 2, 2013, Waltraud Kashin returned home to her apartment at 612 West Avenue in Lancaster and observed that a door was ajar and the doorframe broken. She discovered that a camera, Bose speaker, jewelry, coins and cash, including Euros and British pounds, were missing. Some of Kashin's jewelry was found in a pawnshop and she was able to buy it back.

On December 15, 2013, Socorro Aponte-Alegria returned to her residence in an apartment complex at 43332 Gadsden Avenue in Lancaster. The door was ajar. Aponte-Alegria saw a footprint on the door and damage to the doorframe. Aponte-Alegria was in the Air Force, and her Air Force issued-backpack and gas mask had been taken. Her handgun and a box of ammunition had also been taken. In addition, a laptop computer, iPhone, Garmin GPS, Sirius XM satellite radio, Air Jordan sneakers, a PlayStation game console and games and cologne were taken. Some of the items were found by police and returned.

Surveillance video from the apartment complex showed two men leaving Aponte-Alegria's apartment shortly before she returned home. They were joined by a third man as they walked away. The video was too dark to identify the men.

In response to an anonymous tip, Deputy Alfonso Stogden sent Deputy NcNutt and another deputy to conduct surveillance of apartment 153 in Aponte-Alegria's apartment complex. This apartment was rented by Colleen

Shanahan. The deputies saw defendant and codefendant Lakeem Harris "going and coming" from the apartment. They did not see Shanahan.

On December 19, 2013, Deputy Stogden, Deputy McNutt, and other deputies executed a search warrant at the apartment. Codefendant Harris was sleeping in the living room with an adult woman and a young boy. Defendant was detained as he was coming out of the northern bedroom. A woman and one or two children were discovered in the southern bedroom. A third man was also in the apartment. Shanahan was not in the apartment.

In the northern bedroom of the apartment, deputies found property stolen in the Aponte-Alegria, Ward and Kashin burglaries. These items included the Euros from the Kashin burglary, the Providence Holy Cross bag taken in the Ward burglary, and the Air Force bag, cologne, video game and iPhone taken in the Aponte-Alegria burglary. Defendant's EBT card was inside the Providence Holy Cross bag.

Deputy McNutt interviewed defendant in a patrol car outside the complex. He did not record the interview. Deputy Stogden, who was the primary investigating officer for the burglaries, believed it was important to record an interview with a suspect.

According to Deputy McNutt, defendant initially denied being involved in the burglaries. Deputy McNutt told defendant, as a ruse, that Harris had implicated him and that defendant had been seen in pawnshop surveillance videos. Defendant told Deputy McNutt that "he was a participant in the [Aponte-Alegria] burglary." He explained that they obtained access by kicking the front door in. Deputy McNutt showed defendant the Air Force bag taken in the burglary, and defendant stated that a handgun, ammunition and a taser were also taken in the burglary.

Deputy McNutt showed defendant the Providence Holy Cross bag taken in the Ward burglary. Defendant said he was there. He said two televisions were taken. Defendant said they gained access through a window.

Defendant talked to Deputy McNutt about the Kashin burglary and said the front door was kicked in to gain access to the residence. Defendant stated that foreign currency, coins, jewelry and a camera were taken.

Defendant told Deputy McNutt he was present at the Reedy burglary. He also stated he was not the person who forced the entry into the residence. Defendant told Deputy McNutt that he got a game system and a computer in the burglary.

Deputy McNutt asked defendant about some of the stolen items being pawned. Defendant stated that he was present with Shanahan when the items were pawned. He was in the background. At trial, during cross-examination, Deputy McNutt testified that he had viewed two surveillance videos from a pawnshop which clearly showed defendant with Shanahan when she pawned items. These two videos had not been produced to the defense. Upon further examination, Deputy McNutt recalled that the videos were not related to this case. It had been at least a year since he had viewed the videos.

The prosecutor played a third surveillance video, dated November 29, 2013, which showed Shanahan in a pawnshop pawning items stolen in the burglaries in this case. The video, which was very dark, showed a man in the background. Deputy McNutt initially opined that the man looked like defendant, but acknowledged that he could not really see the man's facial features apart from his nose. In the end, he said it was probably defendant in the video but "I can't say for sure it is."

The pawnshop manager testified that records showed Shanahan sold jewelry to the shop on five occasions in November and December of 2013. Kashin and Ward viewed jewelry sold to the pawnshop by Shanahan and confirmed that some of the jewelry was theirs.

Defendant did not present any evidence at trial. He stipulated that he had a prior felony conviction.

Codefendant Harris testified that he was living with his girlfriend and two children in Shanahan's apartment in November and December. They rented the southern bedroom from her. Harris noticed Shanahan and friends carrying things in and out of the apartment but did not look inside. Defendant was Harris's cousin and he had only been staying in the apartment for a few days while Shanahan was out of town. Defendant used Shanahan's bedroom.

Harris testified that he bought a PlayStation and game from Jay Cash, a friend of Shanahan. He suspected that they were stolen but did not know for sure. Defendant bought a pair of shoes from Cash. The shoes came in the Providence Holy Cross bag. Harris said the man in the pawnshop video was Cash, not defendant. Harris stated the name "Jay Cash" was an alias. He did not know the man's real name or where he lived.

Harris acknowledged Deputy McNutt questioned him in a patrol car on the day the warrant was served and again at the station. Harris denied admitting any involvement in the burglary to Deputy McNutt. After Deputy McNutt finished speaking with Harris, Harris could hear the deputy in the hall talking to defendant. According to Harris, Deputy McNutt said, "Davion, are you ready to talk and Davion said, I don't even know what you're talking about. And he said, okay, wait until you see your reports in court."

DISCUSSION

A. Substantial Evidence Supports Defendant's Convictions

Defendant contends there is insufficient evidence to support any of his convictions and so the convictions violate his state and federal constitutional rights to due process. He contends the only evidence he committed the burglaries was the testimony of Deputy McNutt, which was too vague and unbelievable to support the judgment.[3]

1. Sufficiency of the evidence review

In evaluating a claim the evidence is insufficient to support a true finding on an allegation, we review the entire record in the light most favorable to the judgment to determine "'whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496.) "We draw all reasonable inferences in support of the judgment. [Citation.]" (*People v. Wader* (1993) 5 Cal.4th 610, 640.) Reversal is not warranted unless it appears "'that upon no hypothesis whatever is there

---

3 Defendant initially claimed the prosecutor failed to prove the corpus delicti of the crime independently of defendant's out-of-court statements and admissions. The victims' uncontradicted testimony established that the burglaries and gun theft took place. Indeed, defendant acknowledged elsewhere in his opening brief that there was no dispute the burglaries and gun theft occurred. This is sufficient to satisfy the corpus delicti rule, which requires independent proof only of the fact of injury, loss, or harm, and the existence of a criminal agency as its cause and so to prove the corpus delicti of the crime. (See *People v. Alvarez* (2002) 27 Cal.4th 1161, 1168.) Defendant's identity as one of the principals in the crimes was not part of the corpus delicti of the crime. (*People v. Wright* (1990) 52 Cal.3d 367, 404.) A defendant's identity as the perpetrator of a crime may be shown by his words alone. (*Ibid.*)

sufficient substantial evidence to support [the conviction].' [Citation.]" (*People* v. *Bolin* (1998) 18 Cal.4th 297, 331.)

2. Culpability for burglary

A person commits burglary when he enters any building with the specific intent to steal, take and carry away the personal property of another, with the specific intent to deprive the owner permanently of that property. (§§ 459, 484, subd. (a).) The person must have the requisite specific intent at the time of entry. (*People v. Holt* (1997) 15 Cal.4th 619, 669.) The existence of this intent must usually be inferred from the facts and circumstances surrounding the offense. (*Ibid*.) Evidence that a person stole property following his entry into a building may create a reasonable inference that he had the intent to steal when he entered the building. (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 541.)

A person may be liable for burglary as an aider and abettor if he "with knowledge of the perpetrator's unlawful purpose, forms the intent to commit, encourage, or facilitate commission of the offense at any time prior to the perpetrator's final departure from the structure." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1046.) The aider and abettor need not enter the building. (See *id*. at pp. 1043-1044 [aider and abettor might act as a lookout].)

A person is liable as a principal whether he directly commits the offense or aids and abets its commission. (§ 31.)

3. The evidence proves defendant was a participant in the crimes

Defendant was linked to the crimes by his admissions to Deputy McNutt and by his possession of stolen property. He first contends that Deputy McNutt's testimony recounting his admissions is unbelievable. Defendant argues McNutt failed to follow normal procedures when he conducted a private field interview of defendant and did not record it.

Defendant also argues that Deputy McNutt's behavior in trying to elicit a confession from him at the station house "directly contradicts" Deputy McNutt's claim that he had obtained a confession from defendant in the field.

Despite awareness of any shortcomings in Deputy McNutt's testimony, the jury found him credible. We have no basis to reverse that finding. "Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 403.)

Defendant next contends that even if Deputy McNutt's testimony is credited, defendant's admissions, as described by Deputy McNutt, are vague and do not prove that he participated in the burglaries or theft of the firearm. Defendant claims his admissions at most show that he heard about the crimes from others.

Defendant expressly admitted that he was "a participant" in the Aponte-Alegria burglary and was aware that a handgun and ammunition were stolen. That is sufficient evidence to support his conviction for that burglary and grand theft of a firearm.[4]

Defendant did not directly admit participating in the Reedy, Ward and Kashin burglaries. His admissions, together with his possession of some of the property stolen in the burglaries, are sufficient to prove that he was a principal in those crimes.

---

4 Deputy McNutt testified that defendant did not clarify if he made entry or acted as a lookout for the Aponte-Alegria burglary. Defendant would be liable as a principal either way. (§ 31.)

Defendant expressly admitted that he was present at the Reedy and Ward burglaries. His statements support an inference that he was present at the Kashin burglary. Defendant described the forced entries of the Reedy, Ward and Kashin residences. Thus, at a minimum, he was aware that his companions were engaged in criminal activity. Defendant described property taken in those three burglaries which was not recovered from Shanahan's apartment.[5] This knowledge supports an inference that he remained at the three residences after the initial entry, until the time when property was actually taken from the residences. Defendant was later shown to possess property stolen in the three burglaries. Defendant's sharing in the proceeds of the burglaries supports an inference that he contributed to the commission of the burglaries either as one of the burglars who entered the residences or by providing assistance to those burglars.

Defendant contends the stolen property in the apartment cannot be linked to him because the evidence showed that he had only been staying there a few days and other people were using the northern bedroom. The stolen Providence Holy Cross bag found in the northern bedroom was linked to defendant by the presence of his EBT card inside the bag. There would be no reason for someone other than defendant to put defendant's EBT card in the bag. Defendant admitted participating in the Aponte-Alegria burglary and stolen property from that burglary was found in the northern bedroom.

---

5 Defendant said he got a game console from the Reedy burglary and Reedy said a Wii game console was taken in the burglary, but nothing belonging to Reedy was found in the apartment. Defendant said jewelry was stolen in Kashin burglary, and the victim reported jewelry stolen, but her jewelry was not found in the apartment. Defendant said two big screen televisions were taken in the Ward burglary, and Ward reported televisions were taken in the burglary. Police did not report finding any stolen televisions in the apartment.

Thus, it is reasonable to infer that he was also responsible for storing the only other stolen property found in that room, the Euros stolen in the Kashin burglary. No property from the Reedy burglary was found in the apartment, but defendant expressly stated that he received a game console and computer from the Reedy burglary.

4. The convictions do not violate due process

A rational trier of fact could have found Deputy McNutt credible and found that defendant's admissions to Deputy McNutt, together with his possession of stolen property, were sufficient to prove his involvement as a principal in the crimes beyond a reasonable doubt. Accordingly, "the due process clause of the United States Constitution is satisfied [citation], as is the due process clause of article I, section 15, of the California Constitution." (*People v. Osband* (1996) 13 Cal.4th 622, 690.)

B. Evidence of an Unrelated Traffic Stop Was Properly Excluded

Defendant sought to impeach Deputy McNutt with evidence of his 2010 traffic stop of "Miss Lemon." Lemon brought a civil suit against Deputy McNutt in which the jury found Deputy McNutt liable for false imprisonment.[6] The trial court ruled the probative value of this evidence was outweighed by the probability the evidence would consume undue time and confuse the jury, and excluded the evidence pursuant to Evidence Code section 352. Defendant contends the court abused its discretion in excluding the Lemon evidence and further contends the exclusion of the evidence violated his right to due process and fair trial.

---

6 Defense counsel proposed to prove this encounter through Lemon's testimony but stated, "I'm not necessarily, your Honor, seeking to introduce the civil case. I think the civil case just adds validity to Miss Lemon's claim that she was illegally searched."

1. Scope of Evidence Code Section 352

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

A trial court has broad discretion to exclude impeachment evidence under Evidence Code section 352. (*People v. Hamilton* (2009) 45 Cal.4th 863, 946.) A court's decision under section 352 will not be disturbed on appeal unless the court exercised its discretion in "'an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' [Citations.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

"[A] state court's application of ordinary rules of evidence—including the rule stated in Evidence Code section 352—generally does not infringe upon" a defendant's "general right to offer a defense through the testimony of his or her witnesses." (*People v. Cornwell* (2005) 37 Cal.4th 50, 82, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

2. The hearing on evidence of Lemon's civil lawsuit

The trial court described the lawsuit as follows: "Miss Lemon filed a lawsuit alleging false imprisonment as to Deputy McNutt. The jury came back and found that Deputy McNutt had or was guilty of false imprisonment. There was some special findings that were also listed. One of the special findings was, in summary, did Detective McNutt have reasonable suspicion or a valid basis to engage in the traffic stop. They said yes. The next question was, did Detective McNutt have consent from Miss Lemon to go ahead and search. The jury came back no. The jury was then asked to

determine if two female employees of the Sheriff's Department searched Miss Lemon's undergarments, to which the jury said no."

Despite these mixed findings by the jury, defense counsel maintained that he planned only "a short line of questioning." In his view, it would be "nothing more than simple impeachment." If Deputy McNutt denied lying, "Miss Lemon will come in and impeach him simply on four or five questions I will ask and then the jury can determine who is the credible witness here." The prosecutor responded that if Lemon testified, he would want to impeach her by calling the two female deputies involved in the search to show that Lemon lied about details of the traffic stop.

The trial court ruled that "it's ultimately going to be Deputy McNutt's word against Miss Lemon's word. And so if Miss Lemon is allowed to impeach Detective McNutt based on what happened during Miss Lemon's case, then certainly Miss Lemon could be impeached by the other two deputies because Miss Lemon's claim was not just against McNutt." The court explained, "And so the jury somewhat came back on both sides. They found, on the one hand, against Deputy McNutt. On the other hand, against Miss Lemon. And then at that point we would really just degenerate into a side trial of who was lying in that incident." The court added, "We would have to get into all of the surrounding facts and try to bolster each side's position. So I find that it would just really confuse the issues at this time."

3. Lemon's testimony was properly excluded

Defendant contends the court abused its discretion in finding that Lemon could be impeached by the two female deputies. Defendant claims there were "no findings of any false statements by Lemon, unlike the findings the jury made about Deputy McNutt and his falsified police report," and Lemon's claims against the two female deputies were "separate and distinct"

from her claims against Deputy McNutt. Defendant maintains that without the female deputies' testimony, there would have been no danger of a trial within a trial and no basis to exclude Lemon's testimony about McNutt.

The record shows that the jury made equivalent findings about the truthfulness of Lemon and Deputy McNutt. Both the trial court and the prosecutor described the jury as making a specific finding that the female deputies did not search inside Lemon's underwear. Since Lemon had claimed the deputies did conduct such a search, the jury's finding is a finding that Lemon made a false statement. The jury also found that Lemon did not consent to the search. Since Deputy McNutt claimed that she did, this is a finding that Deputy McNutt made a false statement. There is nothing in the record on appeal to indicate that the jury specifically found Deputy McNutt falsified his police report.

The claims made by Lemon against all three deputies were similar and arose from the same traffic stop. Lemon claimed that all three deputies acted improperly toward her and then lied to cover it up. The trial court did not abuse its discretion in finding that if Lemon were to testify Deputy McNutt lied about some details of the traffic stop, the female deputies could testify that Lemon also lied. As the trial court correctly concluded, this additional testimony would indeed have resulted in a trial within a trial, with the potential to result in undue consumption of time and jury confusion.

4. There was no violation of due process

As a general matter, application of the ordinary rules of evidence do not infringe on a defendant's right to present a defense. (*People v. Cornwell, supra,* 37 Cal.4th at p. 82.) Defendant contends, in effect, that the Lemon evidence was so vital to his defense that federal due process principles required its admission. He contends the prosecution's entire case rested on

Deputy McNutt's "uncorroborated" testimony and so evidence calling Deputy McNutt's credibility into question was vital to his defense.

Deputy McNutt's testimony was corroborated by the circumstances of defendant's arrest, which took place in a small apartment containing items stolen in three of the burglaries. Lemon's credibility was itself questionable, since the jury in her civil lawsuit did not find all of her claims about the traffic stop believable. Accordingly, the Lemon testimony was not so vital to the defense that due process required its admission. For these same reasons, even assuming the trial court erred in excluding the evidence and the error implicated the federal standard of review, it is clear beyond a reasonable doubt that the exclusion of Lemon's testimony did not contribute to the verdict. (See *Chapman v. California* (1967) 386 U.S. 18, 24.)

C. The Prosecutor Did Not Commit Discovery Misconduct

Defendant contends the prosecution violated section 1054.1 and *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) by willfully failing to disclose two videos from an unrelated case showing defendant and Shanahan in a pawnshop. He claims the trial court abused its discretion in denying his request for either a mistrial or an instruction on delayed discovery.

1. Prosecutor's duty to disclose evidence

Due process requires the prosecutor to disclose material, favorable evidence to the defense. (*Brady, supra*, 373 U.S. at p. 87; *People v. Salazar* (2005) 35 Cal.4th 1031, 1042 (*Salazar*).) Evidence is favorable to the defense if it is exculpatory or if it impeaches a prosecution witness. (*Salazar,* at p. 1042.) The prosecutor's duty to disclose "extends even to evidence known only to police investigators and not to the prosecutor." (*Id*. at p. 1042.)

A *Brady* claim requires a showing that the material, favorable evidence was suppressed by the prosecution, "either willfully or inadvertently."

(*Salazar*, *supra*, 35 Cal.4th at p. 1043.) Evidence that is presented at trial is not considered suppressed, even if it was not previously disclosed during discovery. (*People v. Verdugo* (2010) 50 Cal.4th 263, 281.)

A *Brady* violation claim is subject to independent review. (*Salazar*, *supra*, 35 Cal.4th at p. 1042.)

A prosecutor has a statutory duty to disclose certain categories of evidence to the defense "if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies. (§ 1054.1.) The two categories which are potentially relevant here are "[a]ll relevant real evidence seized or obtained as a part of the investigation of the offenses charged" and "[a]ny exculpatory evidence." (§ 1054.1, subds. (c) & (e).)[7]

2. Midtrial hearing

After Deputy McNutt testified about the two videos which had not been produced, McNutt and the prosecutor attempted to locate the videos. They did not find them. Defense counsel stated that he believed the prosecutor did not have the two videos.

The prosecutor explained he believed that Deputy McNutt had seen defendant in a video unrelated to this case. The prosecutor also believed that Deputy McNutt initially had a "mistaken memory" of where he saw the video with defendant at the counter because he reviewed the videos more than a year and a half ago.

---

7 The other four categories are the names and addresses of intended prosecution trial witnesses; statements by any defendant; any felony convictions for material witnesses; and written or recorded statements of witnesses the prosecutor intends to call at trial, including reports or statements of experts. (§ 1054.1, subds. (a), (b), (d) & (f).)

The court ruled: "I don't find a willful discovery violation." The court declined to give the delayed discovery instruction requested by defense counsel because it "requires that the D.A. or law enforcement purposefully withheld evidence for a tactical advantage. I don't think that is the situation here." The trial court found "it seems that the People learned about this simultaneously with [the defense] during cross-examination in terms of Detective McNutt talking about seeing [defendant] in another video."

Defense counsel argued the prosecution had been grossly negligent in not making sure before trial it had received all the videos and discovery from the investigating officers. The trial court replied, "They have no obligation to turn that over initially. It was related to a—it referred to an unrelated investigation. Now, it did come up. But 1054 is clear that they are to turn over information that is relevant to this case. I agree with you. That testimony, as it's now fully explained, is irrelevant for the most part. So I don't find a discovery violation at all. The People had no obligation to turn that over."

3. The prosecutor did not willfully fail to disclose evidence

Defendant contends the trial court erred in finding the prosecutor did not know about the two videos before trial. He further claims that even if the prosecutor did not possess the videos personally, the police had the videos and the prosecutor had a duty to produce favorable evidence in the hands of the police.

a. Foreknowledge

Defendant claims the prosecutor elicited the initial testimony from Deputy McNutt about the two unproduced videos and then engaged in a "deliberate" line of questioning which leaves no doubt that the prosecutor discussed the video with Deputy McNutt before trial. Defendant did not

make this claim in the trial court. He argued only that the prosecutor did not search diligently for the videos.

Assuming this argument is not forfeited, the record does not support defendant's claim. The record shows that it was defendant's trial counsel who initially elicited the testimony about the two videos. The first apparent reference to multiple surveillance videos is at page 625 of the reporter's transcript. That page reports the cross-examination of Deputy McNutt by Mr. Beggs, defendant's trial counsel.[8] Defendant has not cited an earlier page which refers to a pawnshop surveillance video.

The prosecutor asked two brief series of questions after the existence of the two videos was disclosed on cross-examination. Both were responsive to issues raised on cross-examination. The prosecutor's most extensive questioning involved the third video, dated November 29, which had been disclosed. Nothing in either line of questioning suggests foreknowledge of the unproduced videos.

b. Duty to disclose

Defendant argued in the trial court that the prosecutor had an ongoing duty to "search and find and turn over everything" and was grossly negligent in this duty. The trial court did not directly address this argument, but simply found that the prosecution would have had no duty to disclose the videos even if it had known about or possessed them. Defendant contends the trial court erred in so finding because the two videos were favorable evidence within the meaning of *Brady* and so the prosecution had a duty to disclose them.

---

8 The prosecutor did ask Deputy McNutt about a surveillance video on direct, at page 608. In context, this appears to refer to the surveillance video of the Aponte-Alegria burglary.

Defendant did not invoke *Brady* in the trial court and did not show that the two videos were favorable to the defense. According to Deputy McNutt's uncontradicted description, the two videos were inculpatory. They showed defendant in a pawnshop with Shanahan, who had pawned stolen jewelry in this case. Defendant contends on appeal that the videos were favorable evidence because they could have been used to impeach Deputy McNutt.

The two videos could only have been used to impeach Deputy McNutt if they showed someone other than defendant or if the man with Shanahan was not shown clearly enough to be identified. Deputy McNutt, the only person to view the two videos, said one clearly showed defendant. Defendant is simply speculating that the video showed someone else, or did not show Shanahan's companion clearly enough to identify him. That is not sufficient to show a *Brady* violation.[9] (See *People v. Zaragoza* (2016) 1 Cal.5th 21, 52 [prosecutor's secondhand description of the videotape did not reveal any evidence favorable to the defense; it was only speculation that favorable evidence might have been discovered if the defense had viewed the tape]; see also *People v. Williams* (2013) 58 Cal.4th 197, 259 [witness's address was not exculpatory evidence because there was no way to know if disclosure would be helpful or harmful to the defense].)

---

9 In his reply brief, defendant speculates that the two unproduced videos show "Jay Cash." He argues that Harris testified the man in the November 29 video was Jay Cash, Deputy McNutt testified that the man in the November 29 video looked like the man in the two unproduced videos, and so the man in the two unproduced videos must be Jay Cash. Defendant did not make this argument in the trial court at the hearing on his request for sanctions, and the absence of any record on this issue precludes us from considering it. At a minimum, defendant's argument would require a determination of Harris's credibility, both about Jay Cash's actual existence and his resemblance to the man in the November 29 video, which cannot be made on appeal.

4. The trial court's remedy for the missing videos was effective

Although the prosecutor had no duty to turn over the two videos from the unrelated investigation before trial, once Deputy McNutt inadvertently testified about those videos, the videos became relevant and should have been turned over to the defense. By the time of Deputy McNutt's testimony, however, the videos were missing. The trial court offered defense counsel two possible remedies: (1) strike Deputy McNutt's testimony on this topic or (2) cross-examine the deputy to make it clear to the jury that the videos were not part of this case. Defendant contends neither was an effective remedy and that either a jury instruction on delayed discovery or a mistrial was required.

The delayed discovery instruction requested by defendant required that the prosecutor or law enforcement purposefully withheld evidence for a tactical advantage. Since the trial court correctly found no willful failure to disclose, that instruction was not appropriate.

Defendant has not shown that he was unable to effectively cross-examine Deputy McNutt in the absence of the videos and that a mistrial was required for that reason. Defendant's further cross-examination of Deputy McNutt was adequate to clarify that the two unproduced videos were not related to this case. That cross-examination also showed that Deputy McNutt had not viewed the videos in at least a year, and cast doubt on how well he remembered the contents of the videos. Cross-examination of Deputy McNutt about the November 29 video, which was viewed by the jury, cast doubt on the deputy's judgment in evaluating any video. Thus, Deputy McNutt's testimony about the two unproduced videos was more than adequately challenged by the totality of the defense's cross-examination.

While Deputy McNutt was a key witness, the two videos were a small part of the deputy's testimony and the prosecution's case. Defense counsel

was able to effectively cross-examine Deputy McNutt and raise questions about his overall credibility without the two videos. The jury was aware that Deputy McNutt had not followed normal procedure in recording crucial evidence from defendant, which called Deputy McNutt's credibility into question. Deputy McNutt's claim that he had viewed two videos which incriminated defendant, but which were now missing, only raised further questions about his credibility. The trial court did not abuse its discretion in denying a mistrial. (See *People v. Haskett* (1982) 30 Cal.3d 841, 854 [trial court has "considerable" discretion in ruling on mistrial motions].)

D. There Was a Manifest Need to Restrain Defendant

Defendant contends the trial court abused its discretion in ordering him to wear an ankle restraint during trial and then ordering the additional restraint of handcuffs for the reading of the jury's verdict.

1. Requirements for restraints

A defendant may only be subjected to physical restraints in the courtroom if there is a showing of a manifest need for such restraints. (*People v. Duran* (1976) 16 Cal.3d 282, 290-291.) A "manifest need" can arise if a defendant is unruly or has expressed an intention to escape. (*Id.* at p. 291.) A showing of violence is not required. "An accused may be restrained, for instance, on a showing that he plans an escape from the courtroom or that he plans to disrupt proceedings by nonviolent means. Evidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained may warrant the imposition of reasonable restraints if, in the sound discretion of the court, such restraints are necessary." (*Id.* at p. 292, fn 11.)

2. There is sufficient evidence to support restraints

Here, there was ample evidence of nonconforming behavior, including violent behavior. As the court noted, defendant had been "volatile in the courtroom in the past."

On February 24, 2015, when the court attempted to ask defendant if he would waive time for trial, the defendant became quite agitated, called the court a "mother fucker" and engaged a in profanity-riddled rant. Defendant stood up and had to be restrained by a deputy and escorted from the courtroom.[10]

Sometime between mid-March and mid-April, while the trial court was explaining an offer to defendant and codefendant Harris, defendant stood up and started walking away. The court and the deputies were "alarmed." Eventually, the court realized defendant was trying to return to the custody area because he did not want to hear what the court was saying.

In addition, the court was aware of two other incidents in which defendant became violent. In September 2014, about seven months before the hearing on restraints, defendant slipped out of his handcuffs and threatened to break items. After being handcuffed again, he began kicking and throwing chairs and ended up shattering a window. The record does not reveal if this behavior took place in the courthouse or elsewhere, but it did involve "deputy personnel." In March 2015, defendant again slipped out of his handcuffs and got into a fight with sheriff's personnel. After defendant was subdued, he told a sheriff's deputy, "I'm going to fuck you up." He then spit in the deputy's face. The record does not reveal if these two incidents

---

10 The trial court did not mention this incident at the April 16, 2015 hearing, but both the incident and the hearing took place before the same judge, and so there is no doubt the court was aware of it.

took place in the courthouse or elsewhere, but both did involve sheriff's personnel.

These incidents show that defendant would disrupt the proceedings if left unrestrained, and are more than sufficient evidence to justify the minimal ankle restraint ordered in this case. It left defendant's hands free so that he could write and "do everything he normally would do. He just could not really get up and flee or go too far."

At the end of trial, the court ordered the addition of handcuff restraints for defendant, for the reading of the verdict. The court pointed out that the reading of the verdict can be a very emotional time. The court explained that throughout the trial defendant "was getting very animated." The court explained, "He continued to act out, making noises, making facial gestures. I will admit there have been a couple of times when my finger was on the duress button wondering if I needed to press it for that." This is sufficient evidence of nonconforming behavior to justify the additional restraints.

Further, even assuming the trial court abused its discretion in ordering the restraints, any error was harmless. Reversal is required only if there is evidence the jury saw the restraints, or evidence that the shackles impaired or prejudiced the defendant's right to testify or participate in his defense. (*People v. Anderson* (2001) 25 Cal.4th 543, 596.) There is no such evidence here.

As the trial court explained, the defense table had a modesty skirt which covered the counsel table from the front, and a bar which obscured the view under the counsel table from the rear. Even if a juror walked up to the bar, the defendant's chair would normally block the view. A juror would have to know what to look for and work really hard to see the restraint. There is nothing in the record to suggest that any juror made such an effort.

The handcuffs were put on defendant after the jury reached its verdict. Even assuming they were visible, they could not have influenced the jury.

Defendant argues on appeal that it is highly likely the leg restraint affected defendant's decision not to testify and deny Deputy McNutt's claim that he confessed. This is speculation, not evidence. The record suggests at least two reasons that defendant may have chosen not to testify. Defendant clearly had trouble controlling his verbal outbursts when angry, which posed a risk of creating a negative impression on the jury when testifying. Defendant might have elected not to take that risk. Codefendant Harris's testimony placed the blame for the burglaries on Shanahan and Cash, and exonerated defendant. Defendant might have decided to rely on Harris's testimony.

The handcuffs were put on defendant after the jury reached its verdict. Thus, they could not have prejudiced defendant's right to testify or participate in his own defense.

E. Independent Review of* Pitchess *Hearing

The trial court granted defendant's *Pitchess* motion for discovery of any complaints or allegations of "fabrication of evidence, fabrication of probable cause, filing or writing of false police reports, and perjury" involving Deputy McNutt. On September 4, 2014, the trial court held an in camera hearing to examine records of complaints made against Deputy McNutt, if any. The trial court ordered disclosure of one complaint to the defense.

Defendant requested that we conduct an independent review of the sealed transcript of the September 4, 2014 in camera hearing to determine if any personnel records were withheld incorrectly. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1232.) We have done so, and find the transcript of the in camera hearing constitutes an adequate record of the trial court's review of

any documents provided to it. The record reveals no abuse of discretion in the trial court's ruling. (See *People v. Hughes* (2002) 27 Cal.4th 287, 330 [court's ruling is reviewed for abuse of discretion].)

F. Defendant's Custody Credits Must Be Corrected

Defendant contends the trial court incorrectly awarded him 817 days of presentence custody when he was entitled to 1,049 days. Respondent agrees with defendant. They are correct.

Defendant was arrested on December 19, 2013, and sentenced on May 27, 2015. He thus had been in custody for 525 days when sentenced. The trial court calculated the total as 409 days.

Correction of this credit error is a matter of simple arithmetic which does not involve any findings of disputed fact or exercise of discretion, and so may properly be done on appeal. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1100-1101; *People v. Acosta* (1996) 48 Cal.App.4th 411, 427-428.)

Defendant was entitled to two days of conduct credit for every two days he actually served. (§§ 2900.5, subd. (a), 4019, subds. (b), (c), & (f).) Conduct days are given in two-day increments. They are not rounded up. (*People v. Chilelli* (2014) 225 Cal.App.4th 581, 588.) He is thus entitled to 524 days of conduct credit. His total presentence custody is 1,049 days.

DISPOSITION

Defendant's presentence custody days are ordered corrected to show 525 days of actual custody and 524 days of credit, for a total of 1,049 days of presentence custody credit. The judgment of conviction is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

ASHMANN-GERST, J.

HOFFSTADT, J.